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No. 89-369

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF AMICUS CURIAE
SERVICE STATION DEALERS OF AMERICA

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STATEMENT OF INTEREST

With the consent of the parties, the Service Station Dealers of America (hereinafter SSDA) respectfully submits this Brief Amicus Curiae in support of the Petitioner. The SSDA is the voice of America's sixty thousand (60,000) independent retail gasoline dealers. It consists of forty-three (43) State and regional dealer associations. The SSDA believes that its interests in the case have not been specifically represented by any of the parties nor their supporting amaci. Specifically, the SSDA brings the perspective of the small business group most affected by the Clean Air Act to this case. SSDA members typically own and/or operate a single service station, which is the sole means of supporting their families. For purposes of the Clean Air Act, they would be classified as non-major stationary sources. Both the

Petitioner, General Motors, as well as many of its supporting amici are major stationary sources and are large businesses which would have greater, but by no means adequate, resources to utilize the remedy suggested by the First Circuit for EPA's inaction on a proposed State SIP revision. Specifically, the SSDA is very concerned that the proposal that a small stationary source is some how adequately protected from EPA inaction by its ability to file a mandamus action in a District Court to compel the EPA administrator to act on a SIP revision. This remedy that simply does not grant any real world relief and if anything, for a small business could be classified as a phyrraic victory. The litigation costs alone would be too great for a small business to bear.

According to EPA's own data, the typical SSDA member firm has a medium net worth of

only Eighty-one Thousand and 00/100 ($81,000.00) Dollars. To suggest, as the First Circuit did, that dealers spend these limited resources pursuing actions to compel the EPA administrator to perform a duty which he or she clearly has to perform under the law is simply not facing reality. Indeed, we further question whether Congress ever intended that the limited resources of small business such as those represented as SSDA be spent on enforcement actions to compel the administrator to perform a non-discretionary duty, as opposed to investing in those control strategies that would most expeditiously produce attainment of the National Ambient Air Quality Standards in the many non-attainment areas across the country. Thus, while in a very broad sense the interest of the SSDA coincide with those of the Petitioner and some of its supporting

amici, the SSDA approaches the issues presented from a perspective not represented in the case and thus, has filed the following brief.

SSDA would add that many of its members run small auto body and paint shops affected by the regulations at issue in the case at bar.

SUMMARY OF ARGUMENT

1. The States have the primary responsibility for the control of air pollution sources within their boundaries under the Clean Air Act; allowing EPA to delay approval or disapproval of revisions to the State's plan beyond the four (4) month deadline, upsets the carefully crafted statutory provisions.

2. The plain language of the statute as well as its legislative history and the unanimous holdings of the Courts of Appeal to

consider it lead to the conclusion that the four (4) month deadline for EPA to approve or disapprove a State's SIP is equally applicable to proposed revisions to that SIP.

3. The First Circuit's proposed two-pronged remedy for EPA's failure to observe the four (4) month deadline is unworkable. First, the citizen's suit remedy would require a company to potentially expose itself to a fine of One Million Five Hundred Thousand and 00/100 ($1,500,000.00) Dollars, and in practice, litigation costs alone make this impractical for a small business such as those represented by SSDA.

The reduction of penalty remedy is something that is left solely at the discretion of the District Court and is not mandatory as are the statutory mitigating factors.

4. Only the enforcement bar rule, as adopted by the Fifth Circuit, gives full effect to Congressional purposes.

ARGUMENT

I. THE STATES HAVE PRIMARY AUTHORITY FOR CONTROL OF AIR POLLUTION SOURCES WITHIN THEIR BOUNDARIES UNDER THE CLEAN AIR ACT.

Of principal concern to the SSDA in the case is the position taken by EPA that it can withhold its approval of a proposed revision to a State implementation plan and thus, in effect, "pocket veto" such revisions, while at the same time seeking penalties against those corporations and sole proprietorships, that may act in good faith reliance on such proposed revisions.

When dealing with the regulation of stationary sources under the Clean Air Act,

it is not unfair to say that the States are the dog and the EPA is the tail.

The plain language of the Act makes clear that "each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State." 42 U.S.C. §7407(a) (emphasis added). Congress has repeatedly reaffirmed this primary role of the States in its periodic revisions of the Act.

For example, in the 1977 revisions to the Act, Congress enacted a method by which States could grant temporary relief from SIP requirements in the form of "delayed compliance orders", the authority for which is now found at 42 §7413(d). The legislative history of this provision states that it was enacted in large part in order to "reaffirm the primary role of the States in the formulation and enforcement of State

implementation plans." See, House Report No. 95-294, 95th Congress, First Session, (1977), re-printed in 1977 U.S. Code Congressional and Administrative News 1077, 1135-1136.

Thus, as this Court pointed out in Train v. Natural Resources Defense Council, 421 U.S 60 (1975):

> "The agency is plainly charged by the Act with the responsibility for setting National Ambient Air Standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source by source admission limitations which are necessary if the national standards that are set are to be met ... the Act gives the agency no authority to question the wisdom of a State's choice of admission limitations if they are part of a plan which satisfies the standards of §110(a)(2) ... so long as the ultimate effect of a State's choice of admission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of admission standards it deems best suited to its particular situation."

421 U.S. at 79 (1975).

Finally, it should be pointed out that if a SIP meets the check list of criteria set out in 42 U.S.C. §7410(a)(2), the administrator has no choice but to approve such SIP or a revision thereto.

Allowing EPA to procrastinate beyond the statutorily prescribed four (4) month deadline, as discussed in detail infra, subserviates the State's to EPA, and grants the Federal Government the primary role that the plain language of the Act leaves for the States.

For this policy reason alone, this Court should affirm the holding of the First Circuit that the four (4) month limitation applies to EPA review of SIP revisions, as well as to the original SIPs themselves.

II. EPA MUST ACT ON A PROPOSED SIP REVISION WITHIN FOUR (4) MONTHS OF THE APPLICATION BY THE STATE.

The threshold issue in this case, as framed by the First Circuit, is "whether the

Act imposes a four (4) month deadline on EPA review of SIP revisions." U.S. v. General Motors Corporation, 876 F.2d 1060, 1065 (1st Cir. 1989). The First Circuit correctly held that the four (4) month limitation does indeed apply to SIP revisions as well as the EPA review of original SIPs. Id. at 1066.

To begin with, Amicus believes that this interpretation is supported by the only reasonable interpretation of the plain language of the Act. Specifically, the Act requires that EPA either approve or disapprove of an original SIP submitted by a State within a hundred twenty (120) days of receipt by EPA of the SIP. 42 U.S.C. §7410(a)(2). Next, §7410(a)(3)(A) dealing with SIP revisions, expressly incorporates the requirements of §7410(a)(2).

Therefore, the First Circuit was clearly correct in following its sister circuits in

holding that the one hundred twenty (120) day deadline for EPA action on a SIP revision is incorporated into 42 U.S.C. §7410(a)(3)(A).

Moreover, 42 U.S.C. §7410(g)(1) discusses circumstances when the EPA administrator has not approved or disapproved the SIP revision within the "required four (4) month period". It should be noted that the First Circuit did not examine the plain implication of §7410(g)(1) in reaching its decision.

While Amicus believes that the Court need go no further than the plain language of the statue in order to affirm the holding of the First Circuit, it is important to note that in at least one Federal Register notice concerning regulations governing penalties for non-compliance pursuant to 42 U.S.C. §7420, EPA itself has acknowledged that the four (4) month limitation applies to SIP

revisions. See, 50 Federal Register 36,732 et. seq. at 36, 733 (September 9, 1985).

Finally, it is important to note that there is now unanimity within the circuits that the Clean Air Act imposes a four (4) month deadline on EPA review of proposed SIP revisions. See Council of Commuter Organizations v. Gorsuch, 683 F.2d 648, 651-52 N.2 (2nd Cir. 1982); Duquesne Light Company v. EPA, 698 F.2d 456 (D.C. Cir. 1983); American Cyanamid v. U.S. Environmental Protection Agency, 810 F.2d 493, 495 (5th Cir. 1987); United States v. General Motors Corporation, 876 F.2d 1060, 1066 (1st

Cir. 1989); United States v. Alcan Oil Products, 889 F.2d 1513 (6th Cir. 1989).[1]

III. THE FIRST CIRCUIT'S PROPOSED REMEDY FOR EPA INACTION IS UNWORKABLE.

The First Circuit in rejecting the enforcement bar adopted by the Fifth Circuit in American Cyanamid attempted to steer what it termed a "middle course between the two extremes, attempting to permit trial courts

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[1] At one time it appeared that the Sixth Circuit may not have required EPA compliance with the four (4) month rule. See United States v. National Steel Corporation, 767 F.2d 1176, 1182-1183 N.1 (6th Cir. 1985). The Sixth Circuit rejected this earlier dicta in its recent Alcan decision. Amicus hereby incorporates by reference the arguments made by Petitioner on this point. Suffice it to say that if the Court should reverse the decision below and hold that the four (4) month limitation does not apply to EPA review of SIP revisions, we would truly be in a situation where the tail, in this case EPA, was truly wagging the dog, the States.

to take account of the circumstances of each case and hopefully accommodate both the State's needs and the public's desire for clean air." U.S. v. General Motors Corporation, 876 F.2d 1060 at 1067. The First Circuit suggested two possible remedies for EPA inaction. The first was for the affected company to bring a citizen's suit pursuant to 42 U.S.C. §7604(a)(2) in order to compel agency action. Id. The second remedy it proposed was for the District Court to consider "the reasonableness of the agency's delay and the prejudice, if any, suffered by the company as a result." Id. We discuss the problems with each of these remedies separately.

A. The Citizen's Suit Remedy.

In order to assess the possible efficiency of the "citizen's suit" remedy proposed by the First Circuit, it is

necessary to examine the statutory language authorizing such suits which is found at 42 U.S.C. §7604.

Specifically, §7604(a)(2) allows any person to commence a civil suit on his behalf against the Administrator where there is a failure of the Administrator to perform an act or duty which is non-discretionary under the Act. §7604(b)(2) provides that no such action may be maintained unless the proposed Plaintiff has given the Administrator sixty (60) days notice of such proposed action.

This notice in turn cannot be provided until the statutory period within which the Administrator may act has run out, in the case of a proposed SIP revision, one hundred twenty (120) days.

Thus, a major stationary source must put itself at risk of a fine of up to One Million Five Hundred Thousand and 00/100

($1,500,000.00) Dollars before it could even begin to avail itself of the remedy proposed by the First Circuit.

Not only must such a source risk such potential exposure, the infliction of litigation costs alone may well be more than such source may bear. This is particularly true of relatively small "major sources."

Amicus can scarcely believe that Congress intended for those sources making good faith, best efforts to reduce pollution, would be forced to squander their resources on actions to compel the administrator to perform non-discretionary duties, when their limited resources would be better spent on pollution abatement. This is particularly true in the case of relatively small businesses.

It should be noted that both the Sixth Circuit in Alcan, as well as the D.C. Circuit

in Duquesne Light, both took the view that the "citizen's suit" remedy adopted herein by the First Circuit would simply not be an effective remedy for EPA inaction. SSDA fully agrees with the Sixth and D.C. Circuits and strongly urges the Court to reject the idea that a citizen's suit is an effective remedy for agency inaction in the present context.

B. Reductions In Potential Penalties Is Also Not An Appropriate Remedy For The Administrator's Inaction.

In reaching its holding that District Courts should consider the reasonableness of the Agency's delay and the prejudice, if any, to a company by the Agency's inaction in determining what penalties should be imposed under the Act, the First Circuit did not accurately quote §113 (42 U.S.C. §7413) of the Clean Air Act.

Specifically, the First Circuit quoted that section of the Act as expressly allowing courts to "take into consideration the size of the business, economic impact of the penalty on the business and the seriousness of the violation in determining an appropriate penalty." 876 F.2d at 1068.

The distinction between the factors enumerated by the statute and the proposed remedy of the First Circuit is that the factors listed by the statute are mandatory, that is, §113(b) of the Act states that District Courts "shall take into consideration the size of the business, the economic impact of the penalty on the business and the seriousness of the violation."

On the other hand, the balancing test proposed by the First Circuit would be purely discretionary with the trial court. Thus, a

trial court would have no duty to reduce the penalties, and even if it did exercise its discretion to reduce such penalties, the penalties would surely be greater than that which a small business, such as those represented by SSDA members, could absorb.

In sum, the hope that a District Court may reduce a penalty due to EPA inaction, is not something that any rational businessman would risk both his livelihood and those of his or her employees over. It is not a workable remedy and the Court should reject it.

IV. ONLY THE ENFORCEMENT BAR AS ADOPTED BY THE FIFTH CIRCUIT IN AMERICAN CYANAMID PROPERLY PRESERVES THE ROLE OF THE STATES AND IS FAITHFUL TO THE PURPOSES OF THE ACT

The SSDA strongly urges the Court to adopt the position taken by the Fifth Circuit in American Cyanamid and require EPA to

either accept or reject a SIP revision before it may bring an enforcement action against the company that is in compliance with such State authorized revisions. SSDA can add little to the cogent arguments already made by Petitioner and the other amici in this regard.

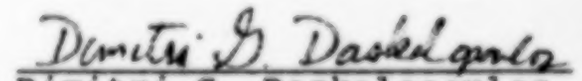
However, we would point out that there are similarities in this situation to other areas of the law. For example, under the antitrust laws, a party which takes actions which may be anti-competitive, yet are compelled by the State, are shielded from antitrust liability by virtue of the state action Doctrine. This was reaffirmed as recently as this Court's 1985 decision in the Southern Motor Carriers case. Similarly, it seems most inequitable to subject a company that acts pursuant to State authorization by virtue of a SIP revision under the Clean Air

Act to be subject to penalties. It would be similar to allowing the Department of Justice to unilaterally define substantive antitrust offenses for which a party, acting under State compulsion, could be held liable. We thus strongly urge adoption of the Fifth Circuit rule.

CONCLUSION

The judgment of the First Circuit should be affirmed as to the issue of whether the four (4) month rule applies to EPA approval of proposed SIP revisions. The judgment should be reversed as to the issue of the appropriate remedy for the agency inaction upon such SIP revision.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 1990, I mailed, first class mail, postage prepaid, three (3) copies of this Brief Amicus Curiae to: Theodore L. Garrett, Covington and Burling, 1201 Pennsylvania Avenue, N.W., P. O. Box 7566, Washington, D.C., 20044 (Counsel of Record for Petitioner, General Motors Corporation), and to: Kenneth W. Starr, Solicitor General, U.S. Department of Justice, Washington, D.C., 20530 (Counsel of Record for Respondent, United States of America). I further certifiy that all parties required to be served have been served.

Dimitri G. Daskalopoulos

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